Supreme Court, U.S.
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No. 93-1575

In The

Supreme Court of the United States

October Term, 1993

ARTHUR CALDERON, Warden,

Petitioner,

v.

ANDRE JOHNSON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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12 pp

QUESTION PRESENTED

Whether the Ninth Circuit correctly decided that respondent met his burden of proof under *Batson v. Kentucky*, 476 U.S. 79 (1986), where the record disclosed a "strong indication" of the prosecutor's racial motive for striking the only Black venire member, and where each of the prosecutor's stated reasons lacked even fair support in the record.

PARTIES TO THE PROCEEDING BELOW

Respondent Andre Johnson was the petitioner-appellant in the Court of Appeals.

Daniel B. Vasquez, Warden, was the respondent-appellee in the Court of Appeals. He has been replaced by Arthur Calderon, who is the present petitioner.

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STATEMENT OF THE CASE

This case arises from a federal habeas corpus petition filed by Andre Johnson against California prison officials based on a violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). On December 15, 1986, the prosecutor in Johnson's state robbery trial exercised a peremptory strike to exclude Ms. Beverly Nichols-Garland, the only Black member of the venire. Johnson is also Black.

In response to questioning by the trial court after Johnson moved for a mistrial, the prosecutor stated that he initially had been willing to accept Ms. Nichols-Garland, but changed his mind when he saw defense counsel striking "people from particular races" including "Mr. Li." The prosecutor then stated that he excluded Ms. Nichols-Garland because she had worked for a criminal defense attorney (though the record shows otherwise); because she was uneducated (though the record refutes this); because she had been evasive in answering questions (though the record refutes this also); and because of her age (though there is no support in the record for that claim). The trial court denied the *Batson* challenge and Johnson was convicted.

On direct appeal, the California Court of Appeal stated that the record did not disclose the state law equivalent of *Batson* error,[1] and affirmed Johnson's conviction. Johnson exhausted his remaining state remedies.

Johnson then filed a federal habeas petition alleging a *Batson* violation. A magistrate judge held an evidentiary

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[1] *People v. Wheeler*, 583 P.2d 748, 761-62 (Cal. 1978).

hearing and recommended that Johnson's petition be denied and the action dismissed. The district court adopted that recommendation and Johnson appealed.

A Ninth Circuit majority reversed and remanded with instructions to issue the writ. *Johnson v. Vasquez*, 3 F.3d 1327, 1328 (9th Cir. 1993). After identifying the correct standard of review, including the presumption of correctness which attaches to state factual determinations,[2] the Ninth Circuit first noted a "strong indication" of the prosecutor's racial motive based on his admitted change in attitude after he saw defense counsel striking "people from particular races." 3 F.3d at 1329-1330. The Ninth Circuit next scrutinized the record and concluded that each of the prosecutor's facially race-neutral reasons was "unsupported in the record or refuted by it." 3 F.3d at 1331. The Ninth Circuit held that Johnson's conviction was tainted by *Batson* error and ordered habeas relief. *Ibid.*

Petitioner seeks certiorari based on an alleged failure of the Ninth Circuit to defer to state factual findings.

REASONS FOR DENYING THE WRIT

The decision below is correct. There is no conflict among the circuits (indeed, none is alleged), nor is there any reason for granting review. The Ninth Circuit duly enforced this court's decision in *Batson* where there was a "strong indication" on the record of racial motive despite

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[2] 3 F.3d at 1329, citing *Sumner v. Mata*, 449 U.S. 539, 547 (1981).

four pretextual, albeit facially-neutral, reasons stated by the prosecutor. The Ninth Circuit complied with the statutory presumption of correctness under 28 U.S.C. § 2254(d), as that presumption is limited by a relevant statutory exception.

I.

THE DECISION OF THE NINTH CIRCUIT IS CONSISTENT WITH THE PRESUMPTION OF CORRECTNESS ACCORDED TO STATE FACTUAL FINDINGS, INCLUDING THE STATUTORY EXCEPTIONS TO THAT PRESUMPTION.

A. The Presumption Of Correctness Under 28 U.S.C. § 2254(d) Is Subject To Statutory Exceptions.

Petitioner maintains that the Ninth Circuit "violated the rules" regarding the presumption of correctness contained in 28 U.S.C. § 2254(d). The presumption of correctness is limited by relevant exceptions including cases – such as the case at bar – where state factual findings are "not fairly supported by the record." 28 U.S.C. § 2254(d)(8).[3]

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[3] 28 U.S.C. § 2254(d)(8) provides that state factual determinations generally shall be presumed to be correct:

> " . . . unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record . . . "

That exception authorizes the Ninth Circuit's holding in this case. The reason for exception (d)(8) is to empower federal courts to correct federal constitutional violations apparent on the state record.

In failing to mention any statutory exceptions to the presumption, petitioner inaccurately depicts the presumption under 28 U.S.C. § 2254(d) as virtually conclusive. The presumption does not divest federal courts of jurisdiction to determine whether state findings on federal constitutional issues are fairly supported by the record. The Ninth Circuit conducted proper scrutiny of the state record and concluded that *Batson* error had occurred in Johnson's trial.

B. The Ninth Circuit Correctly Determined That The Prosecutor Had A Racial Motive, That The Prosecutor's Stated Reasons Were Pretextual, And That State Factual Findings To The Contrary Were Not Fairly Supported By The Record.

The Ninth Circuit adhered to the sequence of analysis contained in this court's *Batson* decision. The first question of whether Johnson offered prima facie evidence of intentional discrimination was bypassed. 3 F.3d at 1329 n. 2. The second question of whether the prosecutor offered facially race-neutral reasons for the strike was assumed to be resolved in the prosecutor's favor. 3 F.3d at 1329.

The pivotal third question was whether Johnson carried his burden of demonstrating intentional racial discrimination. *Ibid.* The Ninth Circuit concluded, after finding a "strong indication" on the record of racial motive, that each of the prosecutor's stated reasons was

"either unsupported in the record or refuted by it." 3 F.3d at 1329-1331. The Ninth Circuit examined each stated reason in detail and found no fair support in the record for any of them. On the contrary, the Ninth Circuit found that each stated reason was "belied by the record." 3 F.3d at 1331. Given those findings, the Ninth Circuit properly noted that "neither the trial courts nor we are bound to accept at face value a list of neutral reasons that are either unsupported in the record or refuted by it." *Ibid.*

The Ninth Circuit complied with the statutory presumption of correctness as limited by 28 U.S.C. § 2254(d)(8).[4] The Ninth Circuit considered – and properly rejected – state factual determinations which lacked even fair support in the record. There was no "violation of the rules" but rather a conscientious adherence to them.

II.

THE DECISION OF THE NINTH CIRCUIT IS NECESSARY AND APPROPRIATE TO IMPLEMENT THIS COURT'S *BATSON* DECISION.

Despite petitioner's purple prose, the Ninth Circuit's decision is neither "cancerous" nor does it invite other courts to "scoff at the presumption of correctness." The presumption of correctness does not extend to state factual determinations lacking even fair support in the record. 28 U.S.C. § 2254(d)(8).

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[4] Cf. *Rushen v. Spain*, 464 U.S. 114, 120 (1983) (finding of fact by state trial and appellate courts deserves high measure of deference, but may be set aside if it lacks even fair support in the record).

As the Ninth Circuit observed, *Batson* would be a "dead letter" if the federal courts are powerless to reject state findings which are flatly contradicted, or totally unsupported, by the record. 3 F.3d at 1331.[5] The exception of 28 U.S.C. § 2254(d)(8) provides that power.

This case demonstrates why a federal forum is necessary to implement *Batson*. From time to time, state courts may be unable or unwilling to look behind a prosecutor's facially race-neutral explanations, even when those explanations are "unsupported by the record or refuted by it." The federal courts have habeas corpus jurisdiction precisely to secure federal constitutional rights, such as Johnson's, after the state courts have failed to do so.

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[5] This case presents a rare instance where the state prosecutor virtually admitted a racial motive, implying that he was responding to defense counsel "excluding people from particular races . . . " That implied admission by the prosecutor, in and of itself, would justify a finding that the prosecutor had a racial motive despite various neutral explanations. Given the further factor that the neutral explanations were "belied" by the record, there was ample and overwhelming support for the Ninth Circuit to reach its conclusion within the parameters of 28 U.S.C. § 2254(d)(8).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully subn..tted,

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